Waymouth Farms, Inc. *and* Milk Drivers and Dairy Employees Union, Teamsters Local 471, affiliated with International Brotherhood of Teamsters, AFL–CIO.[1] Cases 18–CA–12766 and 18–CA–12891

October 31, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On April 5, 1995, Administrative Law Judge Frederick C. Herzog issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief to the Respondent's exceptions, a brief in support of the judge's decision, and in addition filed exceptions and a supporting brief. The Respondent filed an answering brief to the General Counsel's exceptions, and a reply brief to the General Counsel's answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as further discussed below, and to adopt the recommended Order as modified[2] and set forth in full below.

I. INTRODUCTION

We agree with the judge, for the reasons set forth by him, that the Respondent refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act by misrepresenting to the Union its intentions and plans regarding relocation of the Respondent's facility located in Plymouth, Minnesota. As set forth below, however, we will modify the judge's recommended remedy to require the Respondent to bargain in good faith with the Union as the exclusive representative of the unit employees at the Respondent's facility located in New Hope, Minnesota, and to require that it do so for a reasonable period of time before it may question the Union's majority status.

II. FACTUAL BACKGROUND

The Union was certified in August 1986 as the representative of a unit of production and maintenance employees employed at the Respondent's facility in Plymouth, Minnesota. The parties executed a collective-bargaining agreement in June 1987. The agreement provided that the Respondent recognizes the Union as the bargaining representative of the unit employees ''in its Plymouth, Minnesota, plants, and at no other geographical locations.'' The judge found that the parties understood this provision to mean that recognition would cease, and the contract would be void, in the event that the Respondent moved from the Plymouth, Minnesota location. The record establishes that the Union agreed to this provision, in part, because it believed it could retain employee support and prevail in another representation election in the event the Respondent relocated the Plymouth facility. The parties executed a successor agreement effective March 10, 1991, to March 9, 1994, which retained the geographic limitation on recognition.

About July 19, 1993,[3] the Respondent closed its Plymouth, Minnesota facility and reopened a new facility 6 miles away in New Hope, Minnesota.[4] In reliance on the parties' collective-bargaining agreement, the Respondent declared that agreement void and ceased recognition of the Union when the geographic relocation occurred.

The sequence of events leading up to the plant relocation are as follows. On April 17, the Respondent entered into an agreement to purchase the new facility located in New Hope. About the last week in April, the Respondent notified the city of New Hope of its desire to occupy the facility, and requested blueprints of the building. On about April 29, an official of the city of New Hope visited the facility with agents of the Respondent to conduct a preliminary inspection of the property in preparation for a formal health inspection. By letter to city officials dated May 3, the Respondent described its intended operation and requested an opinion on the appropriateness of that intended use under the city zoning code.

Nevertheless, when the Respondent first notified the Union of its relocation intentions by letter dated April 23, it failed to mention that the Respondent had entered into the agreement to purchase the New Hope facility on April 17. Rather, the Respondent stated in its April 23 letter that ''although the company is considering several options, relocation may occur outside the state of Minnesota.''

In late April or early May, union representatives visited the Respondent's Plymouth facility and inquired as to the relocation. The Respondent's representatives responded that it was only known that the lease at the Plymouth facility would expire in late July. The Respondent's representatives again failed to mention the April 17 agreement to purchase the New Hope facility, and failed to mention the additional steps the Respondent had taken with city officials to prepare the New Hope site for relocation. The representatives of the Respondent and the Union at this time additionally discussed assistance for workers who might be dislocated on relocation. The Union proposed that a severance

[1] We have modified the caption to reflect the current name of the International Union.

[2] We shall modify the judge's recommended Order to reflect the amended remedy as discussed infra, and to comport with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[3] All dates are in 1993 unless otherwise noted.

[4] The decision to close the plant is not alleged to be unlawful.

package be provided, and the Respondent promised it would respond back to the Union.

Sometime shortly after this visit, Union Representative Laxen telephoned The Respondent's representative, Gamache, to schedule a date to discuss severance pay for employees. Laxen in addition inquired as to the relocation. Gamache replied that it looked certain that the move would be necessary due to the inability to reach a new lease with the landlord of the Plymouth facility, and that the Respondent was just beginning to look at new locations, including some outside the State of Minnesota. The Respondent again did not inform the Union of its agreement to purchase the New Hope facility, or its extensive contact with city officials.

Nor did the Respondent's officials reference their conduct to effectuate the relocation to New Hope when the parties subsequently met on May 13 to discuss a plant closure agreement. While the Respondent's representatives on this date failed to mention any conduct in relation to New Hope, they did affirmatively state that the Respondent ''was considering sites in California, South Dakota, and towns in Minnesota such as Buffalo, Eagen, or Eden Prairie.''

On May 17, the Respondent closed on the purchase of the New Hope facility, and notified its landlord at the Plymouth location that it would vacate that facility by the end of July. The Respondent and the Union met on the following day, May 18, to further discuss the plant closure agreement. Despite having closed on the purchase of the New Hope facility on the previous day and given notice to its landlord, the Respondent's representative, Gamache, stated that no decision about the move had yet been made.[5] The Respondent did not mention the significant events that had occurred the previous day. The parties in this context continued to negotiate the plant closure agreement and the Union's proposal regarding a severance package.

Later that day on May 18, the Respondent by fax to the Union accepted the Union's proposed plant closure agreement. The agreement specified different requirements for receipt of severance benefits by employees depending on whether or not the Respondent relocated more than, or less than, 20 miles from the Plymouth facility. The agreement further provided that the Respondent was required to offer all employees the right to request a transfer to the new facility and if there were an insufficient number of positions available, the Respondent was to select employees for termination based, in its sole judgment, on skill, ability, and performance. The agreement also provided that the collective-bargaining agreement between the parties would be terminated on completion of work at the Plymouth facility.

On May 19, the Respondent met with a contractor about remodeling the New Hope facility, and explained that it needed to be in the facility in July. At this time, the Respondent's representative warned the contractor that the move was not known to employees, and instructed the contractor not to discuss the move with anyone other than the Respondent's representative.

On June 21, the Union received a postcard from the Respondent informing it of the relocation of the facility to New Hope. This was the first instance in which the Respondent notified the Union of the New Hope location, and was additionally the first mention throughout the course of negotiations of any plan to relocate so near the Plymouth facility.[6]

The Union thereafter commenced an organizing campaign with respect to the New Hope facility. The Union secured authorization cards, and filed a representation petition with the Board's office. The Union subsequently filed the instant unfair labor practice charge, and withdrew the representation petition.

On moving to the new facility, the Respondent exercised its right under the plant closure agreement to terminate employees if there were an insufficient number of positions available at the New Hope facility. On relocation the Respondent decreased the number of enrober operators from six to three, and terminated employees Nancy Tischner, Phil Blumenthal, and Cindy Jefferson. Pursuant to the terms of the plant closure agreement, the Respondent selected these employees for termination based on its judgment of their skill, ability, and performance. Additionally, the Respondent at the time of the relocation granted employees wage increases ranging from a few cents per hour to over a dollar an hour. The record further establishes that at the time of relocation, all 70 of the New Hope employees had been previously employed at the Plymouth location.

III. DISCUSSION

A. *The Judge's Decision*

The judge found that the Respondent never informed the Union of the steps it had taken to purchase the New Hope facility, its plans to remodel that facility, and its action to satisfy governmental requirements to complete the relocation. The judge found that the Respondent maintained to the Union that the relocation plans were unknown, and emphasized that relocation might occur outside the State of Minnesota. The judge observed that these misrepresentations occurred throughout the course of the parties' negotiations concerning the plant closure agreement. The judge accordingly found, and we agree for the reasons set forth by

[5] The judge found that Gamache had previously assured the Union that the Respondent would likely know what its relocation plans were by May 18.

[6] The Respondent had sent a memo dated June 1 to employees describing the relocation to New Hope. The Respondent did not send this memo to the Union.

him, that the record evidence establishes that the Respondent violated Section 8(a)(5) and (1) of the Act by misrepresenting to the Union its intentions and plans regarding plant relocation while engaged in negotiations with the Union for a plant closure agreement.[7] As the Supreme Court has declared, ''[g]ood-faith bargaining necessarily requires that claims made by either bargainer should be honest claims.'' *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956).

The judge accordingly found that the plant closure agreement had been obtained via the Respondent's bad-faith bargaining, and must therefore be set aside. The judge likewise found, and we agree for the reasons set forth by him, that the termination of the three employees pursuant to the unlawfully obtained plant closure agreement additionally violated Section 8(a)(5) and (1) of the Act.[8]

The judge's recommended remedy for the Respondent's unlawful bargaining was to order the Respondent, on request, to bargain in good faith with the Union regarding a plant closure agreement and, if an agreement is reached, to embody such agreement in a written and signed document.

The General Counsel has excepted to the judge's recommended remedy. The General Counsel argues that the judge erred by limiting the bargaining order to negotiations concerning a plant closure agreement. The General Counsel submits that the contractual geographic limitation in the recognition clause is rendered void because of the Respondent's bad-faith bargaining. The General Counsel accordingly contends that the appropriate remedial relief is that the Respondent should be ordered to recognize the Union as the representative of the unit employees at the New Hope location, and bargain with the Union as their representative concerning all terms and conditions of employment, for a reasonable period of time, before the Respondent may question the Union's majority status.

The Respondent counters that the contractual geographic limitation clause precludes the Board from ordering the Respondent to recognize and bargain with the Union as the representative of employees at the New Hope facility. The Respondent submits that accordingly the Board is without authority to grant recognition to the Union at the New Hope facility, and that the only way the Union can attain recognition at the New Hope facility is via an organizational campaign. The Respondent thus argues that the Board may not modify the agreed-on bargaining unit to include representation at the New Hope facility.

B. *The Appropriate Remedy*

It is the primary responsibility of the Board to devise remedies that effectuate the policies of the Act, and the Board is vested with broad discretion in that determination. *Sure-Tan Inc. v. NLRB*, 467 U.S. 883, 898 (1984); *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 215–216 (1964); *NLRB v. Rutter-Rex Mfg. Corp.*, 396 U.S. 258, 262–263 (1969). The purpose of the Board's remedial relief is to restore, so far as possible, the status quo that would have obtained but for the wrongful act. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

The usual remedy given by the Board in cases—as here—in which an employer fails to bargain in good faith about the effects of its decision to close is set forth in *Transmarine Navigation Corp.*, 170 NLRB 389, 390 (1968). Pursuant to *Transmarine*, the Board orders the respondent to bargain with the union, on request, about the effects of its discontinuance of business operations. Accordingly, the judge correctly recommended that the Respondent be ordered to bargain with the Union, on request, about the effects of its discontinuance of business operations at its Plymouth, Minnesota facility.[9]

[7] We have carefully considered the Respondent's argument in its exceptions that the judge failed to consider its evidence assertedly establishing that it in fact was considering relocation to sites other than New Hope. Assuming arguendo that the evidence so establishes, the unlawful misrepresentation remains: that of repeatedly failing to inform the Union of specific steps the Respondent had taken to relocate to New Hope, while continually mentioning and emphasizing other geographic options including those outside the State of Minnesota. The record unequivocally establishes that the Respondent never mentioned the New Hope location to the Union.

[8] We note that the judge inadvertently erred by stating that the Respondent terminated these employees because they engaged in union activities, and we shall modify the judge's recommended Order in this regard. Further, the interest on any payments required under the Board's Order shall be calculated as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The General Counsel has excepted to the judge's inadvertent failure to pass on the complaint allegation that the Respondent violated Sec. 8(a)(5) and (1) of the Act by unilaterally granting wage increases to employees at the time of the relocation. The record evidence establishes, however, that the Union clearly and unmistakably waived its right to bargain about such increases. Union Representative Laxen testified that it ''was always understood between the parties that the Employer could give a wage increase above the contract rate at any time.'' We shall accordingly dismiss this complaint allegation.

[9] Further, pursuant to the usual *Transmarine* remedy, in order to ensure meaningful bargaining and to effectuate the policies of the Act, we shall order the Respondent to pay its employees employed at the time of the relocation backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this decision until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the discontinuation of its operations; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this decision or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith. In no event shall the sum paid to any of the employees exceed the amount each would have earned as wages from the time the Respondent relocated its operations, to the time each secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain, whichever occurs first; provided, however,

The General Counsel asserts, however, that the judge's recommended remedy, alone, is insufficient to restore the status quo that would have obtained but for the Respondent's wrongful conduct. The record evidence shows that the New Hope facility is located only 6 miles from Plymouth; that all 70 of the New Hope unit employees were previously employed at Plymouth; and that notwithstanding the move, the Respondent's business remained essentially the same. There is, further, no evidence that unit employees were displeased or otherwise disaffected from the Union at the time of the relocation. Thus, in the absence of the geographic limitation clause, the Union would have been entitled to recognition at the new plant once it became clear that a substantial percentage, i.e., at least 40 percent, of the employees there had been transferred from the plant at which the Union represented the work force. *Rock Bottom Stores*, 312 NLRB 400 (1993), enfd. 51 F.3d 366 (2d Cir. 1995).[10] The question to be decided is, therefore, whether the Respondent should be allowed to rely on the geographic limitation clause to relieve it of what would otherwise be its statutory obligation to recognize the Union at the new location.

The Board will honor a geographic limitation clause in which a union waives employees' rights to continued representation at a new facility as long as there is no evidence that the employer has secured the waiver by taking ''any action to mislead the Union or to keep the Union uninformed.'' *Mohenis Services*, 308 NLRB 326, 333 (1992). The evidence here establishes that the Respondent unlawfully misled the Union about its relocation plans. We therefore find that the Respondent is precluded from enforcing the waiver as a shield against its bargaining obligation.

The record evidence established that the Respondent understood that it was the Union's intention, in the event of plant relocation, to organize the employees at the new location. During the parties' negotiations, the Union expressly stated to the Respondent that it was accepting the geographic limitation on recognition in large part due to its belief that it could successfully organize the employees at a new location. Both parties were accordingly mindful that any relocation would be accompanied by an organizational campaign and, indeed, the Union commenced such a campaign immediately on learning in late June of the Respondent's plans to relocate to New Hope.

The effect of the Respondent's unlawful conduct, however, was to preclude the Union from timely commencing organizing the employees at the new location. Had the Respondent truthfully bargained concerning its plans, the Union would have been alerted in late April to the possibility of the New Hope relocation. The Union thus would have had the opportunity to inform the unit employees that the Respondent might well be relocating to a nearby location, and to commence organizing from its position as an incumbent union throughout the next several months until the relocation occurred. Because of the Respondent's wrongful conduct, however, the employees were presented with the fait accompli announcement of relocation by the Respondent, followed by the Union's necessarily belated initiation of its attempt to organize the employees, with only a month remaining before the relocation and the termination of the Union's status as the employees' bargaining representative. As we have found, the Respondent's failure to disclose its true relocation plans also tainted the bargaining over the effects of the relocation. The Respondent's deception thus breached the essence of the arrangement agreed to by the parties: that the Union would waive the employees' right to continued representation by the Union at a new location, based on an understanding that both parties would fulfill their legal and contractual obligations, including the duty to bargain in good faith, as long as the Respondent remained in business at the Plymouth facility. These obligations included an obligation on the part of the Respondent to deal fairly and truthfully with the Union over the critical issue of when and where the relocation would occur. The Respondent thus fundamentally misconceives its legal obligation by maintaining that it ''had no obligation to act as anything but a non-union employer when issues relating to the New Hope facility arose.''[11]

As noted above, absent the geographic limitation clause, the Respondent would have been obligated to recognize the Union at the new location once it became clear that most of the employees there had transferred from the plant at which the Union represented the work force. Because we will not, for the reasons stated above, give effect to the geographic limitation clause, we find that the appropriate remedy in this pro-

that in no event shall this sum be less than the amount these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. See *Emsing's Supermarket*, 284 NLRB 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989). The primary purpose of the *Transmarine* remedy is ''to create an incentive for the Company to bargain in good faith.'' *Nathan Yorke v. NLRB*, 709 F.2d 1138, 1145 (7th Cir. 1983).

[10] Under the doctrine of *Harte & Co.*, 278 NLRB 947 (1986), not only the recognitional obligation, but also the contract, would extend to the new facility if at least 40 percent of the employees at the new facility had transferred from the facility in which the union was the incumbent. The complaint does not, however, allege that failure to extend the contract violated the Act. Accordingly, we have limited our remedy for the Respondent's bad-faith bargaining to imposition of the bargaining order.

[11] The Respondent's answering brief to the General Counsel's exceptions, p. 5. We also do not agree with the Respondent's contention that having accurate information about the Respondent's relocation plans at an earlier date would not have affected the Union's organizing efforts, and therefore no remedial relief is necessary. The Respondent's own conduct establishes persuasively that it believed that different results might have obtained. Otherwise, there is no explanation for its lack of candor in the negotiations.

ceeding is an affirmative bargaining order directing the Respondent to bargain with the Union as the representative of the unit employees at the New Hope, Minnesota facility. Longstanding Board and court precedent further instructs that fulfillment of our remedial goals is best achieved by requiring the Respondent to bargain with the Union for a ''reasonable time'' without questioning the Union's majority status.[12] The underlying policy is that when a bargaining relationship has been restored after being unlawfully broken, it must be given a reasonable time to succeed before an employer may question the union's representative status. *Lee Lumber & Building Material Corp.*, supra; and *Franks Bros. v. NLRB*, supra at 705.[13]

Contrary to the Respondent's contention, the issuance of a bargaining order to remedy the Respondent's unlawful conduct is not inconsistent with *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). In *H. K. Porter*, the Supreme Court held that the Board could not compel the parties to agree to a particular contract proposal even if the Board found that a party was refusing in bad faith to agree to the proposal. What we are dealing with here is not, however, an ordinary term and condition of employment, but the basic question of whether an employer should be required to continue recognizing a union as the representative of its employees. Our conclusion that a meaningful remedy here requires a bargaining order is simply not the kind of order ''compelling a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement'' that the court condemned in *H. K. Porter*, 397 U.S. at 102. To the contrary, our decision here, to recognize the waiver of the employees' statutory right to continued representation only on the condition that the Respondent upholds its obligation to bargain with the employees' representative, is in fundamental support of the principles of good-faith bargaining by which agreements are mutually enforceable and not subject to unilateral modification.

CONCLUSION

For all the above reasons, we shall order the Respondent to bargain in good faith with the Union as the exclusive representative of the unit employees at the Respondent's facility located in New Hope, Minnesota, and it must do so for a reasonable period of time before it may question the Union's majority status.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Waymouth Farms, Inc., New Hope, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively with the Union, as the exclusive bargaining representative of its employees in the following appropriate unit, by refusing to provide accurate information to the Union about its intentions and plans to relocate its facility located in Plymouth, Minnesota:

> All regular full-time and regular part-time production and maintenance employees, drivers, woodshop, plexiglass, and warehouse employees, and leadmen, employed by Respondent at its Plymouth, Minnesota facility until July 19, 1993, and thereafter at its New Hope, Minnesota facility; but excluding office clerical employees, receptionists, sales employees, engineers, quality control department, research and development personnel, customer service employees, guards and supervisors, as defined in the Act.

(b) Discharging employees pursuant to a plant closure agreement which was negotiated in bad faith.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with Milk Drivers and Dairy Employees Union, Teamsters Local 471, affiliated with International Brotherhood of Teamsters, AFL–CIO as the exclusive representative of the employees in the appropriate unit concerning terms and conditions of employment and reduce to writing any agreement reached as a result of such bargaining.

(b) Pay the employees employed at the time of the relocation their normal wages for the time period as set forth in footnote 9 of this decision.

(c) Within 14 days from the date of this Order, offer Nancy Tischner, Phil Blumenthal, and Cindy Jefferson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Nancy Tischner, Phil Blumenthal, and Cindy Jefferson whole for any loss of earnings and other benefits suffered as a result of the Respondent's

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[12] See, e.g., *Franks Bros. v. NLRB*, 321 U.S. 702, 705–706 (1944); *Poole Foundry & Machine Co.*, 95 NLRB 34, 36 (1951), enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952); *Stant Lithograph, Inc.*, 131 NLRB 7, 8 (1961), enfd. 297 F.2d 782 (D.C. Cir. 1961) (per curiam); and *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 178 (1996), remanded 117 F.3d 1454 (D.C. Cir. 1997).

[13] The factors for determining a reasonable period of time are set forth in *Caterair International*, 322 NLRB 64, 68 (1996). The Board has found a reasonable bargaining period to encompass as few as 4 months and as much as a full year of good-faith bargaining. See, e.g., cases cited in *NLRB v. Williams Enterprises*, 50 F.3d 1280, 1290 (4th Cir. 1995).

unlawful action, in the manner set forth in the remedy section of the judge's decision as modified here.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its place of business in New Hope, Minnesota, copies of the attached notice marked ''Appendix.''[14] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 4, 1993.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain collectively with the Union, as the exclusive bargaining representative of our employees in the following appropriate unit, by refusing to provide accurate information to the Union about our intentions and plans to relocate our facility located in Plymouth, Minnesota:

> All regular full-time and regular part-time production and maintenance employees, drivers, woodshop, plexiglass, and warehouse employees, and leadmen, employed by us at our Plymouth, Minnesota facility until July 19, 1993, and thereafter at our New Hope, Minnesota facility; but excluding office clerical employees, receptionists, sales employees, engineers, quality control department, research and development personnel, customer service employees, guards and supervisors, as defined in the Act.

WE WILL NOT discharge employees pursuant to a plant closure agreement which we negotiated in bad faith.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain with Milk Drivers and Dairy Employees Union, Teamsters Local 471, affiliated with International Brotherhood of Teamsters, AFL–CIO as the exclusive representative of the employees in the appropriate unit concerning terms and conditions of employment and reduce to writing any agreement reached as a result of such bargaining.

WE WILL pay the employees employed at the time of the relocation their normal wages for the time period as set forth in *Transmarine* remedy of the Board's decision.

WE WILL, within 14 days from the date of the Board's Order, offer Nancy Tischner, Phil Blumenthal, and Cindy Jefferson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Nancy Tischner, Phil Blumenthal, and Cindy Jefferson whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Nancy Tischner, Phil Blumenthal, and Cindy Jefferson, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WAYMOUTH FARMS, INC.

Joseph H. Bornong, Esq., for the General Counsel.
Steven C. Miller, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. This case was heard by me in Minneapolis, Minnesota, on March 22 and 23, 1994. It is based on charges filed by Milk Drivers and Dairy Employees Union, Teamsters Local 471, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union), alleging generally that Waymouth Farms, Inc. (the Respondent) violated Section 8(a)(5)[1] and (1),[2] of the National Labor Relations Act (the Act). On December 10, 1993,[3] the Regional Director for Region 18 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations of Section 8(a)(1) and (5) of the Act. The Respondent thereafter filled a timely answer to the allegations contained within the complaint, denying all wrongdoing.

All parties appeared at the hearing and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Based on the record, my consideration of the briefs filed by the counsel for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that, at all times material hereto, the Respondent is now, and has been, a Minnesota corporation, with an office and principal place of business in Plymouth, Minnesota, until about July 19, and in New Hope, Minnesota, since that time, where it is engaged in the manufacture and nonretail sale and distribution of snack foods; during the calendar year 1993, the Respondent, in conducting the business operations, described above-derived gross revenues in excess of $1 million and purchased and received at its Plymouth and New Hope, Minnesota facilities goods valued in excess of $50,000 directly from points outside the State of Minnesota, and sold and shipped from its Plymouth and New Hope, Minnesota facilities goods valued in excess of $50,000 directly to points outside the State of Minnesota.

Accordingly, I find and conclude that, at all times material hereto, the Respondent is, and has been, an employer engaged in commerce and in a business affecting commerce within the meaning of Section (2)(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that, at all times material hereto, the Union is, and has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts of this Dispute*

Waymouth Farms, Incorporated operated a facility from which it engaged in its business as a packager of snack foods in the Westpoint Business Center, at the address of 13870 Industrial Park Boulevard, Plymouth, Minnesota, until the summer of 1993.

Teamsters Local 471 was certified as representative of certain employees of Waymouth Farms, Incorporated in August 1986. The parties have entered into two collective-bargaining agreements since then.[4]

The first agreement was reached in June 1987, following difficult negotiations between the parties. One provision of the agreement, union security, was reached as part of a compromise in which the Union agreed that, if the Employer were to move away from Plymouth, or open new facilities, or, as the parties put it, ''go across the street,'' then the Union would lose its right to recognition and its contract would be void. The Union was well aware that this was the interpretation of the Respondent throughout negotiations.[5]

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[1] Sec. 8(a)(5) of the Act provides that, ''It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).''

[2] Sec. 8(a)(1) of the Act provides that, ''It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . .''

Sec. 7 of the Act provides that, ''Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).''

[3] Unless otherwise noted, all dates here shall refer to the calendar year 1993.

[4] The unit, as modified from the agreements between the parties, is:

> All regular full-time and regular part-time production and maintenance employees, drivers, woodshop, Plexiglass, and warehouse employees, and leadmen, employed by Respondent at its Plymouth, Minnesota facility until July 19, 1993, and thereafter at its New Hope, Minnesota facility; but excluding office clerical employees, receptionists, sales employees, engineers, quality control department, research and development personnel, customer service employees, guards and supervisors, as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

[5] The Union's representative testified that the negotiations fully disclosed that the Employer intended to make it reestablish its majority status if he moved anywhere all. He stated:

> Q. And what was—what did the company propose to prevent the work stoppage?
>
> A. Halverson came back from a lunch meeting with Gerry Knight and he called me out in the hall, and Bentz was with me at that time, and he said to me, ''I can give you what you need as far as your recognition clause and I'll give you what you need as far as union security, but only on the grounds that it will be effective for the address in Plymouth, Minnesota where we are presently located.''
>
> A. Halverson made it real plain to me, and there was no misunderstandings about that one, is that if that company is moved across the street I wouldn't have them, and he said, ''That is understandable,'' and he says, ''That is the only way I'll get you what you need as far as the union security and the recognition clause,'' and I told him I'd have to run that by the committee, which I did.

The initial agreement expired in 1991. However, the successor agreement contained the same geographic limitation as the initial agreement. Indeed, no attempt was made by the Union to secure a change in the language, and it was not discussed at all during the negotiations.

The Respondent's packaging operations were carried out under several different roofs while in Plymouth. This resulted in inefficiencies, such as the requirement that enrober machines be double staffed. As a result, in 1992 the Respondent began looking into relocation at a new site where all its operations could be carried out under one roof, so that its operations could be consolidated.

On April 17 the Respondent entered into an agreement to purchase a new facility at 5300 Boone Avenue North in New Hope, Minnesota. By Gerard S. Knight, the Respondent entered into a purchase agreement on that date. KEP Investments, Incorporated, again by Gerard S. Knight, closed on the purchase of the 5300 Boone Avenue North facility on May 17.

It now operates an essentially similar business in New Hope. The two locations are about 6 miles apart driving distance.

On May 17 the Respondent also notified its Plymouth landlord that it would not be staying at the Plymouth location past July 31.

On May 19 the Respondent met with a contractor about remodeling of the new facility, and explained that it needed to be in the new facility in July. the Respondent's representative told the contractor that the move wasn't common knowledge among employees and that he didn't want the move discussed with anyone but himself. In early June an agreement was reached by the Respondent and the contractor to complete the remodeling by July 31.

In about the last week of April agents of Waymouth Farms, Incorporated notified the city of New Hope of Waymouth Farms' desire to occupy the facility at 5300 Boone Avenue North. They requested blueprints of the building. They described the intended operation in a letter dated May 3 in a request for an opinion on the appropriateness of its intended uses under applicable zoning codes.

On about April 29 the city of New Hope sanitarian, D. D. Matasovsky, visited the 5300 Boone Avenue North facility with agents of Waymouth Farms, Incorporated to do a preliminary walk-through inspection of the property in preparation for a formal health inspection.

Despite all this, when the Respondent first notified the Union of the move, it wrote on April 23 that:

> This letter will serve as notice under the Worker Adjustment and Retraining Notification Act. It appears that the Company's plant in Plymouth, Minnesota may be closed because of inability to renew its lease satisfactorily. The lease expires on or about July 31 . . . . Although the Company is considering several options, relocation may occur outside the State of Minnesota.

The letter then went on to emphasize that workers would be separated and that the names and jobs of affected workers were on an attached list.

Union Representatives Laxen, Bentz, and Ruth went to the Respondent's facility in late April or early May and spoke to the Respondent's representatives Gamache and Keenan. The Union's steward, Jahnke, also attended the meeting. In response to the Union's inquiry about what was going to be happening, Keenan said that it was only known that the lease would expire in late July. They then discussed assistance for the workers who would be dislocated. Following a caucus in which the Union decided to seek severance pay for affected employees, the Union proposed to the Respondent that a severance package be provided. The Respondent promised to get in touch with Knight and get back to the Union.

Shortly afterwards, while on the phone with Gamache to set up a date to discuss severance pay for employees, Laxen asked Gamache if he knew anything about the Respondent's plans. Gamache again referred to the inability of the Respondent to reach a new lease with it's Plymouth landlord and stated that it looked for certain as if a move would be necessary. However, Gamache went on and stated that the Respondent was just beginning to look at new locations, including some outside the State.

The parties met once again at the Union's office on May 13. Gamache again professed ignorance about what was to become of the employees. Keenan stated that the Respondent was considering sites in California, South Dakota, and such places in Minnesota as the towns of Buffalo, Eagan, or Eden Prairie. The Respondent presented a written plant closure agreement, and read it aloud. No agreement was reached then, however.

The parties met again on May 18 to discuss the plan. Gamache had assured the Union that it would likely know what the plans were by that time. At this meeting the Union revised its demands downward. Gamache said that he'd have to run the Union's new demands by Knight. As to the move, Gamache said that no decision had been made as yet, but he was not sure he would move if the Respondent did.

That afternoon the Respondent faxed the Union a new draft, by which it accepted the Union's severance package. Next day, Bentz and Laxen signed the agreement (which was modified a couple of days later in ways not important to the decision of this case). The ''Plant Closing Agreement'' between the parties provides that the Respondent was required to offer all employees the right to request a transfer to the new facility, but, if insufficient positions are available at the new facility then the Respondent was to select employees based on skill, ability, and performance, as determined by the Respondent. The agreement specifies different requirements for receipt of severance benefits by employees depending on whether or not the Respondent relocated to a place more, or less, than 20 miles away from its Plymouth location. The agreement also provides that the collective-bargaining agreement between the parties would be terminated on completion of work by bargaining unit employees.

On June 21 the Union received a postcard from the Respondent, which was a copy of what the Respondent sent to customers. The postcard stated that the Respondent was moving to New Hope, just 6 miles away.

A. I told them just how I felt. That that wouldn't bother me with that type of a language in the contract because we weren't going to do any better anyway. That if we had to we would—and they moved we would just have to re-sign them. I still am an optimist and still think the Teamsters do a good enough job they can go out and sign their people up again.

This was the first time that the Union had heard of any plan to relocate in any location so near the old one.[6]

The Union's initial reaction was to begin organizing the employees, and securing authorization cards, in order to secure recognition at the new location. Indeed, the Union went so far as to file a petition with the Board. However, shortly thereafter, the petition was withdrawn, and the instant unfair labor practice charge was filed.

While operating at the Westpoint Business Center through June and part of July Waymouth Farms, Incorporated, employed six enrober operators. They were Nancy Tischner (hired October 22, 1987), Bill Walton (hired November 11, 1987), Leon Payne (hired November 30, 1987), Phil Blumenthal (hired April 25, 1988), Cindy Jefferson (hired June 18, 1990), and Marsha Moore (hired January 11, 1993).

Immediately after moving to the Boone Avenue facility Waymouth Farms, Incorporated employed only three enrober operators. On about July 15 Nancy Tischner, Phil Blumenthal, and Cindy Jefferson were told by their supervisors that they would not be needed at the new facility and they were terminated shortly thereafter.

The selection of Tischner, Blumenthal, and Jefferson for layoff was based on the procedure set forth in the plant closing agreement between the parties, that is, Waymouth Farms' determination of their relative skill, ability, and performance.

In July the Respondent notified the Union of specific dates on which employees transferred to the new facility, as well as that, because of the move, the employees were no longer members of the Union. Most employees received wage increases, which ranged from a few cents per hour to over a dollar an hour.

All except three employees (Tischner, Blumenthal, and Jefferson) were offered transfers. They, instead, were notified that their services were no longer needed, and they were paid the agreed-on severance benefits.

B. *Discussion and Conclusions*

Counsel for the General Counsel's claim is that the negotiations leading to the plant closing agreement were tainted by fraud, and he goes on to argue that, as a result, the agreement should be found invalid, and violative of Section 8(a)(5) of the Act. Counsel for the General Counsel also argues that the Respondent engaged in changes in employees working conditions in excess of those which were negotiated between the Respondent and the Union, and that any such changes were violative of Section 8(a)(3) of the Act.

In *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956), the Supreme Court stated that, ''Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims.''

Thus, the Board has held that intentional misrepresentation or concealment of an employer's future plans during collective bargaining violates Section 8(a)(5). *Royal Plating Co.*, 160 NLRB 950, 954 (1966). And, it has ordered restoration of the status quo ante where an employer made false representations during negotiation of a severance plan. *Sheller-Globe Corp.*, 296 NLRB 116 (1989). In fact, an employer's misrepresentations have led repeatedly to sanctions by the Board. Cf. *Accurate Die Casting Co.*, 292 NLRB 284 (1989), and *Penntech Papers*, 263 NLRB 264 (1982).

I accept counsel for the General Counsel's arguments to the effect that from and after April 17 the Respondent was no longer able to represent in good faith to the Union that it's plans for relocation were still unknown to it, or that they involved the possibility that the relocation would involve a move hundred, perhaps even thousands, of miles away.

The evidence is clear that by that time, and as confirmed by rapid developments thereafter, the Respondent had settled on the New Hope facility, had plans to remodel it to suit its needs, and was involved in all the administrative and governmental work to carry out its intent to relocate to that location.

Yet, the evidence is also clear that following that date, while the Respondent was engaged in negotiations with the Union concerning plant closure and severance payments to employees, the Respondent's officials repeatedly lied to the Union about whether or not such plans had been finalized. While the Union was afforded notice of the intent to move on April 23, the Respondent sought then to emphasize that no plans had been reached about where to relocate, for example by the words in its letter, i.e., ''Although the Company is considering several options, relocation may occur outside the State of Minnesota.'' That untruth was repeated verbally to the Union, several times, for approximately a month thereafter, right up to the signing of the plant closing agreement.

Accordingly, I find that the Respondent engaged in bad-faith bargaining when it misrepresented its state of planning to the Union, by concealing the fact that it had reached a decision as to where it would relocate from and after April 17. It simply strains credulity too much to attempt to agree with the Respondent that the purchase of that property does not also signal the fact of a plan having been reached. I find and conclude that it did.

In the Respondent's view, however, the matter cannot rest there. the Respondent would have it that the fact of concealment of its intent had no effect on negotiations and, even if it did, given the language of the agreement reached, the Union waived any right to rely on it.

The Respondent argues that the language of the plant closure agreement provides explicitly for just such a move. That is, in the Respondent's view, an agreement which provides alternative benefits and provisions for workers in case the move is either more or less than 20 miles shows that the Union has waived its right to claim that deception played any part in these negotiations.

The Respondent then points out that the Union conceded at trial that it has no sure way to know what tack it would have taken had the information been accurately presented to it, other than the probabilty that it would have attempted to organize employees at an earlier date.

In response, I find that I agree with counsel for the General Counsel's argument to the effect that there is no requirement that there be actual proof that the misrepresentations would have certainly led the Union to a different result in negotiations, so long as the misrepresentations are relevant to the issues during negotiations. *Architectural Fiberglass*, 165 NLRB 238 (1967). Here, while it is true as claimed by the

[6] The Respondent had, however, sent employees a memo dated June 1, notifying them of the fact that it had leased a new plant facility at the New Hope address. It went on to say that all administrative and distribution functions, and a portion of production facilities, would be relocated there.

Respondent, that prior agreements had waived the Union's right to claim representation rights if the facility relocated, the subject of the distance of the proposed relocation is seen by me as presumptively appropriate to, and relevant, in any discussion of, or negotiations about, severance benefits and transfer rights of employees.

Further, it seems clear to me that the Respondent cannot rely on the silence of the Union, and its failure to seek any revision of the 20-mile provision in the plant closure agreement. To do so would be to absolve the Respondent from any blame for having misrepresented what its intentions were. For one cannot say what effect good-faith disclosure would have had on negotiation for that agreement, and whether or not it would have still contained the 20-mile provision.

Accordingly, I find and conclude that the Respondent's claim that the Union has waived its right to bargain in good faith over severance benefits of employees is not meritorious, and that the Respondent has violated Section 8(a)(5) and (1) of the Act.

Similarly, for the same reasons, the Respondent's reliance on the terms of that plant closure agreement, which it illegally obtained from the Union, in terminating three employees cannot be allowed to stand. A remedy shall be provided for these violations of Section 8(a)(5) and (1) as part of the order for the return of the status quo ante.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

It shall be recommended that the Respondent be required to reinstate the three employees named below to their former or, if not available, substantially equivalent positions of employment, without loss of seniority or other privileges. It shall be further recommended that the three employees named below be made whole for lost earnings resulting from the discrimination against them by payment of a sum of money equal to that he or she would have earned from the date of discharge to the date a bona fide of offer of reinstatement, less net interim earnings during that period. Backpay shall be computed in the manner prescribed by *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[7]

It shall be further recommended that the Respondent be ordered to expunge from its records any reference to the discharges of the three employees named below, and to provide each of the three written assurances that the Respondent's unlawful conduct will not be used as a basis for further personnel action against him or her.[8]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Since on or about April 17, 1993, the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively in good faith concerning transfer rights and severance benefits with the Union by misrepresenting its intentions and plans regarding plant relocation.

4. The bargaining unit described below is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

> INCLUDED: All regular full-time and regular part-time production and maintenance employees, drivers, woodshop, plexiglass, and warehouse employees, and leadmen, employed by the Respondent at its Plymouth, Minnesota facility until July 19, 1993, and thereafter at its New Hope, Minnesota facility.
>
> EXCLUDED: but excluding office clerical employees, receptionists, sales employees, engineers, quality control department, research and development personnnel, customer service employees, guards and supervisors, as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. Since on or about July 15, 1993, the Respondent has violated Section 8(a)(1) and (5) of the Act by discharging its employees Nancy Tischner, Phil Blumenthal, and Cindy Jefferson, because they had engaged in union or other protected, concerted activities.

6. The above unfair labor practices have an effect on commerce as defined in the Act.

[Recommended Order omitted from publication.]

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[7] See generally *Isis Plumbing & Heating Co.*, 138 NLRB 1357 (1962).

[8] See *Sterling Sugars*, 261 NLRB 472 (1982).